87-316

No. _____

Supreme Court, U.S.
FILED
JUL 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

IRENE H. ALLEN, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether this Court's treatment of the "discretionary function" exception to the Federal Tort Claims Act in United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984), precludes government liability where the Government acts as a regulator of private conduct.

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PARTIES

Plaintiffs, numbering approximately 1200, are listed in the Appendix (Petitioner's Appendix E, hereafter Pet.App. E).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported in Allen v. United States, 816 F.2d 1417 (10th Cir. 1987) (Pet.App. A). The Opinions for the United States District Court for the District of Utah are reported in Allen v. United States, 588 F.Supp. 247 (D. Utah, 1984) (Pet.App. B) and Allen v. United States, 527 F.Supp. 476 (D. Utah 1981) (Pet.App. C).

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered April 20, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1346(b): United States as defendant.

Subject to the provisions of Chapter 171 of this Title, the District Courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(a): Exceptions

The provisions of this Chapter and section 1346(b) of this Title shall not apply to--

a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Relevant portions of the Atomic Energy Acts of 1946, Pub. L. No. 585, 60 Stat. 755, and of 1954, 42 U.S.C. §§2011-2296, are set forth in the Appendix at Pet.App. F and Pet.App. G, respectively.

STATEMENT OF THE CASE

This is a case brought by approximately 1,200 Plaintiffs representing victims of low-level radiation exposure from fallout during United States atmospheric testing. The Complaint against the United States for injuries and death (cancer and leukemia) was filed in the District Court for the District of Utah August 30, 1979. Plaintiffs or their decedents resided in Utah, Arizona, or Nevada during open-air nuclear testing. Plaintiffs complain of the Government's negligence in monitoring testing results; in failing to inform persons at hazard of the dangers from the testing; and in failing to inform the persons at risk how to avoid, minimize, or mitigate the dangers. Early in the case, the United States filed a Motion to Dismiss based on the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. §2680(a). The District Court denied the Motion and the

Opinion is found at Allen v. United States, 527 F.Supp. 476 (D. Utah 1981).

As required by the mandate of the Atomic Energy Acts to provide for the safety of the public, Pub. L. No. 585, 60 Stat. 755; 42 U.S.C. §§2011-2296, duties were specified in public information plans prepared for each test series and approved by the Atomic Energy Commission (Tr. at 157; DX-85 (Ranger); PX-907/DX-119 (Buster-Jangle); PX-908/ DX-141, DX-144, DX-1178 (Tumbler-Snapper); DX-270, 271, 184, 185, 190, PX-909/DX-153-303 (Upshot-Knothole); PX-910/DX-205, DX-323 (Teapot); DX-376, PX-911/DX-392, PX-224/DX-387, DX-405, PX-217 (Plumbbob)). The Public Information Plan for Buster-Jangle (PX-907) (p. 3) requires:

> "That the Manager, [Santa Fe Operations Office], be authorized to make announcements deemed necessary for reasons of safety and security immediately prior to any test operations; to confirm

> the fact of tests afterward in the same manner as at RANGER; and to make announcements necessary in connection with local radiological safety, and the handling of damage claims. . . . "

The public information plan for Tumbler-Snapper (PX-908) established that responsibility for public information on all phases of test shots rested upon the Test Manager who was to operate in accordance the plan. The plan designated the types of public announcements authorized and included pre-shot notices to public officials and citizens of nearby communities of possible blast and/or radiation effects as necessary in the interest of public safety (p. 6).

The public information plans for Upshot-Knothole (PX-909) and Teapot (PX-910) explain their purpose as establishing guidelines for issuing information publicly in order to protect life and property with warnings designed to avoid or reduce off-site hazards.

One theme for the information program

was what individuals and local authorities should do in case potential hazards occur (PX-910, p. 9). According to Richard D. Elliott, Director of the Joint Test Information Office, the radiation monitoring teams were authorized to explain radiation to the public (Tr. at 161-173), but he did not determine whether the monitors had enough knowledge to give information or warnings (Tr. at 185).

James E. Reeves was Deputy Test Manager at the Nevada Test Site for each series of atmospheric tests beginning with Upshot-Knothole (Tr. at 113, 115, 117). He testified that when it came to safety of citizens living in the vicinity of the test site, he placed no restrictions on people such as Oliver Placak, U.S. Public Health Service senior officer in charge of off-site monitoring, to warn, inform, or assist off-site residents with respect to radiation hazards (Tr. at 138-40). "If he [Placak]

wanted to spend $200,000.00 to reduce the fallout and estimated dose on people and the people and equipment were available to do it, I wouldn't question it one minute." However, Placak never warned anyone of the carcinogenic risks of radiation exposure (Tr. at 278).

Atomic Energy Commission press releases, such as a January 25, 1951 release (PX-923), downplayed any thoughts of danger:

> "All areas of the earth are subject to cosmic ray bombardment. Much of the earth contains radioactive minerals such as uranium. Each area has a normal background of radioactivity which can be determined by sensitive measuring instruments. It is simply part of the AEC's normal program to control radioactivity hazards and to provide public assurance of safety. Such checks are a routine part of that program. They are conducted routinely around all AEC installations where radioactive materials are used."

After tests in January 1951, the AEC announced that no levels of radiation had been found that could conceivably produce

any damage to humans (PX-922).

The newspapers customarily read by Plaintiffs had similar information. For example, in the Washington County News in St. George, Utah for March 26, 1953 the fact of a detonation was reported (PX-918): "Radiation fallout reported by field monitoring teams at other points in the Nevada Proving Grounds region was low. None of the levels at any point was hazardous." Even when roadblocks were set up after atomic dust was discovered on cars near St. George, the AEC emphasized "that persons. . . exposed to the material were in no danger." (PX-919).

A little yellow booklet entitled "Atomic Test Effects In The Nevada Test Site Region" was distributed by the thousands through schools, post offices, and motels throughout Southern Nevada and Utah, Arizona, and California. Report of Off-Site Radiological Safety Activities, Operation

Teapot, Nevada Test Site, Spring-1955 (PX-338). This booklet (PX-832) downplayed fears about radiation exposure. Off-site residents were told that their "best action is not be worried about fallout" (p. 33).

The film, "Atomic Tests In Nevada" (PX-912) explains safety precautions (Tr. at 287, 289-91) and tells viewers:

> "Word has just been received from the Atomic Energy Commission that due to a change in wind direction, the residue from this morning's atomic detonation is drifting in the direction of St. George. It is suggested that everyone remain indoors for one hour or until further notice. <u>There is no danger.</u>" (Emphasis added).

(Tr. at 281).

Monitoring instruments were often calibrated to the high-energy gamma rays, but little attention was directed to the careful monitoring of lower-energy gamma rays, or measurement of beta radiation or determination of beta/gamma ratios. On

occasion, off-site monitors were specifically instructed to work with the metal beta shields on their instruments completely closed. CEG 1 Proceedings of the Off-Site Monitors Workshop, at 21 (1980) (PX-297); T. Shipman, "Special Rad Safe Problems--Operation Bungle, BUSTER-JANGLE," July 11, 1951, at 2 (PX-88).

William Johnson, the radiological safety officer for Tumbler-Snapper, reported that none of the military personnel assigned to sampling ever had received any previous training in the procedures associated with fallout studies. W. Johnson, et al., "Report of the Advisory Personnel to the Air Sampling Program," Operation Tumbler-Snapper, WT-566 (June 1953), at 10 (PX-362). Before Upshot-Knothole in 1953 it was determined that post-shot reports would be made to owners of livestock of nearby fallout levels, but this was not done and it remained for owners to discover such

exposure and report to the test organization. Abstract of Report, Committee to Study Nevada Proving Grounds (February 1, 1954, at 43-44) (PX-51/DX-1I).

Frank Butrico, a Public Health Service monitor, testified regarding the events in St. George, Utah on May 19, 1953 following Test Harry (Tr., at 844-74). During this event, although he was cautioned to dispose of his clothing and decontaminate himself by showering, Butrico was not told to inform the public to do so as well (Id., at 872). AEC stated in numerous documents on numerous occasions that it had no right to expose off-site population to levels of radiation permitted for its employees. Adam, Test Effects in Nevada, at 36 (PX-832/DX-1153). Pursuant to the on-site radiation protection standards for the same series (Operation UPSHOT-KNOTHOLE: Radiological Safety Operation, WT-817 (March-June 1953), at 17 (PX-698)), the levels of radiation

experienced in Shot Harry would have required the following on-site response: (1) delineation of contaminated areas; personnel entering these areas accompanied by a monitor; and rad-safe clothing and equipment issued to personnel. (2) Rad-safe monitors assigned to individuals or groups working in contaminated areas acting in an advisory capacity to keep the recovery party leader informed of radiation intensities at all times. (3) Film badges, dosimeters, and protective clothing (coveralls, booties, caps, gloves, dust respirators, etc.) as deemed necessary issued to personnel entering contaminated areas. (4) When eating or smoking in any contaminated area, sensible sanitary precautions taken.

None of these measures were taken off-site for the public--including Plaintiffs or their decedents--prior to or following Shot Harry (Tr., at 844-74) (testimony of Butrico).

After 17 months of deliberation the District Court rendered its 225 page Opinion in favor of 10 of the 24 representative victims in Allen v. United States, 588 F.Supp. 247 (D. Utah 1984). The 14 cases where the Court found for the Government were decided on the issue of causation only. Concerning discretionary function, the District Court looked at whether the Government's "acts were so imbued with considerations of public policy and governance as to be immunized from the reach of the Federal Tort Claims Act." Id., at 336. It is the nature of the specific decision, not the fact that some decision or choice was made, that is important. Id., at 339. The case here is not footed on the fact that high level policy decisions were made--but is footed on the allegedly inappropriate manner in which such policy decisions were carried out. Id., at 340. The Court determined that the acts

complained of--failure to adequately warn, to adequately and contemporaneously measure, and to adequately educate the population at hazard in simple and inexpensive preventative and mitigating measures--are not discretionary because the Government did not adopt a policy of indifference to safety. Id., at 337. The Court concluded, to the contrary, that the Government was liable for its negligent failure to carry out directives and follow the guidelines of the AEC regarding public safety.

The United States Court of Appeals for the Tenth Circuit reversed, based upon its interpretation of United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). The Tenth Circuit held that the government actors had a general statutory duty to promote safety which was broad and discretionary. Allen v. United

States, 816 F.2d 1417 (10th Cir. 1987). The Court ruled that it was left to the AEC to decide exactly how to protect public safety and the Government's conduct is therefore protected. Id., at 1421. The Tenth Circuit also determined that the public information plans fell within the discretionary function exception. Id.

Judge McKay's concurring opinion points out that the FTCA, as interpreted in Varig, "is largely a false promise in all but 'fender benders' and perhaps some cases involving medical malpractice by government doctors." Id., at 1424-25 (McKay, J., concurring). McKay wrote that Varig "gives little help to lower courts applying the new standard to specific facts--if the FTCA waiver of immunity indeed applies to anything but trivial government failures...." Id., at 1426. This Petition follows.

BASIS FOR FEDERAL JURISDICTION

The United States District Court had jurisdiction of this action pursuant to 28 U.S.C. §1346(b) and the Federal Tort Claims Act, 28 U.S.C. §§2671-80.

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE WHETHER THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT APPLIES TO NON-REGULATORY CONDUCT.

After four decades of judicial experience with the Federal Tort Claims Act, there is still no adequate explanation of the FTCA and its discretionary function exception. This case is the perfect vehicle for finally defining "discretionary function." This case involves 1,200 victims unwittingly exposed to low-level radiation during open-air atomic tests conducted by the United States. These victims and their representatives are left remediless by the Tenth Circuit's interpretation of Varig and the discretionary function exception.

A. Certiorari Should Be Granted Because The Discretionary Function Exception Is An Important Federal Question.

The Tenth Circuit has decided an important question of federal law which has not, but should finally be, settled by this Court. This is more than an academic question or a one-time problem. Rather, this is a very common issue which deserves this Court's attention.

The cases relied upon by the Tenth Circuit Court of Appeals in Allen v. United States, 816 F.2d 1417 (10th Cir. 1987), Varig, and Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), do not settle the question of the discretionary function exception. Varig is limited in its holding. First, it is an inspection case, dealing with the liability of the Federal Aviation Administration in carrying out inspection of aircraft for certification. Second, it is a regulatory case in that the Federal Aviation

Administration was performing a regulatory function.

Dalehite holds that the court must determine whether a Plaintiff's allegations attack the rules formulated by the agency or merely their application.

In the present case, the Government itself--rather than a third party--created the risk of injury by its conduct. The injuries in this case would not have occurred without the Government's act. The conduct complained of here was not regulatory and did not regulate private conduct. The AEC itself had the duty to provide for the safety of the off-site public and it created the risk of harm through its atomic weapons testing. The AEC is liable for its commission compounded by its omission. Its conduct gave rise to the very problem which required it to monitor. Varig does not immunize the United States from such liability. Cases where the

Government is the primary negligent party are not in the same category as those involving Government inspection or regulatory activity.

In Varig, when this Court examined the Federal Aviation Act, it determined that the Act granted to the Secretary of Transportation the discretion to prescribe reasonable regulations governing the inspection of aircraft, including the manner in which such inspections should be made. Varig, at 804, 104 S.Ct. at 2760.

The responsibility discussed in Varig is a completely different kind of responsibility than existed in the present case where the AEC had imposed upon it--by the Act which created it and by the public information plans--the express duty to provide for the safety of the public. There was no congressionally delegated or mandated duty on the part of the airline industry to carry out a program for the safety of the

public. However, such a public safety program was mandated to be carried out by the AEC.

Where Varig discusses the Federal Tort Claims Act and the discretionary function exception in particular, this Court examined the testimony of Assistant Attorney General Francis M. Shea where he described the discretionary function exception as being "designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency--for example, the Federal Trade Commission, the Securities and Exchange Commission, the Foreign Funds Control Office of the Treasury, or others." Id., at 809, 104 S.Ct. at 2762. Again, Varig applies the discretionary function exception to a regulatory or licensing agency. The present case does not deal with any regulatory or licensing function in carrying out the public safety program.

The Federal Tort Claims Act was passed by Congress in 1946 as a means for providing compensation to those injured by the negligent acts of government employees without continually imposing upon Congress and the President the burden of "disposing of such matters by private claim bills." S.Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942); H.R.Rep. No. 1287, 79th Cong., 1st Sess. 2 (1946); H.R.Rep. No. 2245, 77th Cong., 2d Sess. 5-7 (1942); S.Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946); Kratzke, The Convergence Of The Discretionary Function Exception To The Federal Tort Claims Act With Limitations Of Liability In Common Law Negligence, 60 St. John's L.Rev. 221 (1986). The Tenth Circuit's decision here violates that principle: "There remain administrative and legislative remedies; we note the express authorization under 42 U.S.C. §2012(i) for the government to make funds available for

damages suffered by the public from nuclear incidents." Allen, 816 F.2d at 1424. Congress has had more than ten years to so act and has yet to do so. The FTCA should not be construed so that it conflicts with the statute's purpose. Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987).

The Federal Tort Claims Act is not dead, Collins v. United States, 783 F.2d 1225, 1231 (5th Cir. 1986) (Brown, J., concurring), and should not be confined to the typical fender bender case. Id. Unless Varig's scope is defined carefully, the discretionary function exception will insulate the Government from nearly all tort liability, contrary to the initial expectation that citizens would receive recompense when their injuries were caused by the Government. Id., at 1234. The Tenth circuit's opinion returns us to the days when Congress was forced to award compensation via the clumsy mechanism of

private bills, contrary to the expectation of a streamlined remedial procedure under the FTCA. Id.

This Court should be careful because the:

> "Government as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases it defends."

Shuman v. United States, 765 F.2d 283, 294-95 (1st Cir., 1985), quoting from Dalehite v. United States, 346 U.S. 15, 50, 73 S.Ct. 956, 975 (Jackson, J., dissenting).

This Court should grant Certiorari to clarify that Varig does not address the situation where the United States has the primary role for operation, but only addresses the situation where the United States has a secondary or regulatory role in

enforcement. Plave, United States v. Varig Airlines: The Supreme Court Narrows Narrows The Scope Of Government Liability Under The Federal Tort Claims Act, 51 J. of Air L. and Comm. 197, 238 (1985).

For these reasons, Certiorari should be granted because this case raises important questions regarding the application of the discretionary function exception to the Federal Tort Claims Act in cases where the Government itself is the operator rather than the inspector or regulator.

B. Certiorari Should Be Granted To Examine The Discretionary Function Exception To The Federal Tort Claims Act Because The Courts Of Appeals Have Differed In Their Reading Of Varig.

In the Tenth Circuit opinion, a conflict among the Circuits post-Varig is demonstrated in Footnote 8. Allen, 816 F.2d at 1423, n. 8 (10th Cir. 1987). While the meaning of the Varig opinion is fairly clear regarding policy decisions, there is a difference of opinion in interpreting the

extent of its meaning. Comment, United States v. Varig: Can The King Only Do Little Wrongs?, 22 Cal.W.L.Rev. 175, 199 (1985).

For example, in Aslakson v. United States, 790 F.2d 688 (8th Cir. 1986), the decedent's sailboat mast struck electrical power lines owned and operated by the Western Area Power Administration. WAPA's decision not to elevate certain power lines running over the lake was a violation of established policy. Citing to McMichael v. United States, 751 F.2d 303 (8th Cir. 1985), the Eighth Circuit Court of Appeals held that where challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees. Id., at 693.

Similar reasoning appears in Baker v. United States, 817 F.2d 560 (9th Cir. 1987). The Secretary of the Department of Health, Education and Welfare licensed Lederle Laboratories to manufacture a polio vaccine. The Secretary promulgated regulations pertaining to safety, purity, and potency standards that serve to protect susceptible persons from contracting polio. Drug manufacturers must establish their product's conformity to these regulations before the Secretary will issue a license for manufacturing. HEW failed to adhere to its own regulations in supervising the Lederle testing of the vaccine. The issue was whether the Government's alleged failure to follow its own regulatory commands is the type of decision that Congress intended to shield by the discretionary function exception. Citing to Collins v. United States, 783 F.2d 1225, 1231 (5th Cir. 1986), the Ninth Circuit held that the

discretionary function exception is inapplicable when a federal agency employee refuses to carry out a mandatory statute or regulation. The Ninth Circuit also distinguished Varig from the facts in Baker by pointing out that in Varig the mandatory regulations governed the conduct of the airline, not the Government. Because of the mandatory regulations, there was no discretion. Where there is a negligent failure to obey a mandatory regulatory command, the discretionary function exception does not insulate the Government from liability.

Conflicting reasoning has been demonstrated where the Second Circuit announced in In re "Agent Orange" Product Liability Litigation, 818 F.2d 210 (2d Cir. 1987), that it could not be seriously contended that the decision to use Agent Orange as a defoliant was anything but a discretionary act. Plaintiffs could not

remove them f om the category of discretionary functions by allegations of negligent labeling, shipping, handling, etc. Id. The Fifth, Sixth, Seventh, and Eleventh Circuits have similar holdings. Ford v. American Motors Corporation, 770 F.2d 465 (5th Cir. 1985), ruled that the Postal Service's sale of a used Jeep without a warning about the Jeep's propensity to tip over was discretionary. Hylin v. United States, 755 F.2d 551 (7th Cir. 1985), held that the enforcement activities of the Mine Enforcement and Safety Administration are protected by the discretionary function exception. Ostera v. United States, 769 F.2d 716 (11th Cir. 1985), held that because there were no guidelines for the decision-making process as to who to use as an FBI informant, the decision to release the informant from jail in order to use him was a policy decision and therefore discretionary.

The critical difference between the holdings of the Circuits is the extent to which Varig exempts the Government from liability. The Agent Orange and similar cases decide--in a conclusory fashion--that certain decisions are discretionary and everything connected or resulting from those decisions are likewise discretionary. On the other hand, the Aslakson, Baker, and Collins tests indicate that where the Government fails to adhere to its own statutory, regulatory, or policy mandate, the discretionary function exception does not apply. This "test" is the more appropriate test. In fact, this test was set forth in Dalehite and apparently was affirmed in Varig. Thus, there is a conflict in the various Circuits pertaining to the discretionary function exception. These conflicts are of no small import when considered in light of the different positions of the parties and of the

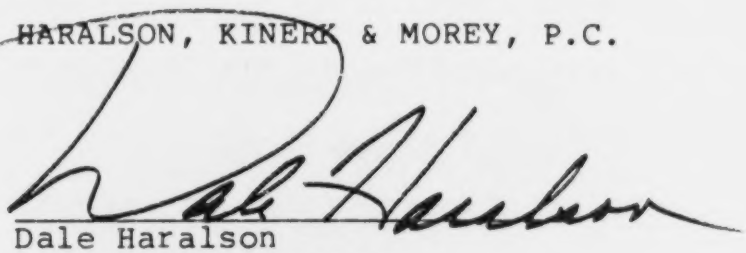
different burdens imposed upon injured parties in meeting the various tests. For example, in some Circuits, plaintiffs must show that the United States violated an established policy in order to avoid the discretionary function exception. On the other hand, other Circuits leave plaintiffs virtually remediless because of a sweeping interpretation of Varig and the discretionary function exception. This does not serve the purpose of the Federal Tort Claims Act. Thus, chaos has been created by the various conflicting interpretations in the Circuits. This Court should accept this Writ of Certiorari in order to resolve this conflict.

CONCLUSION

For the reasons set forth above, Petitioners request this this Court grant Certiorari.

RESPECTFULLY SUBMITTED this 20th day of July, 1987.

HARALSON, KINERK & MOREY, P.C.



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CERTIFICATE OF SERVICE

Dale Haralson, an attorney for Petitioners and a member of the Bar of this Court, certifies that on July 24th, 1987, copies of the foregoing Petition for Writ of Certiorari, along with the Appendix (bound separately), were served by mail upon all parties required to be served:

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DATED THIS 20th day of July, 1987.

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SUBSCRIBED AND SWORN to before me this 20th day of July, 1987.

Cynthia A. Hayes
Notary Public

My Commission Expires:
My Commission Expires Sept. 19, 1987